92-567

Supreme Court, U.S.
FILED
SEP 30 1992
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

October Term, 1992

JAMES J. BOUTROSS
MARTIN HARRIS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the rule announced by the United States Court of Appeals for the District of Columbia Circuit in *United States v. Brown*, 823 F.2d 591 (D.C. Cir. 1987) that the Sixth Amendment to the United States Constitution forbids the excuse of any juror during deliberations if there is "any possibility" that the juror's request to be excused stems from the juror's view of the sufficiency of the evidence is a correct statement of law and should have been applied in this case, where a juror who requested to be excused during deliberations advised the trial court "I don't feel the defendants are guilty" based upon her difference of opinion with other jurors as to how to view the evidence?

2. Whether an agreement by counsel for the Petitioners to allow the trial court to voir dire a juror *in camera* to determine why the juror wanted to be excused from the jury panel during deliberations constitutes a waiver by counsel of the Petitioners' rights under Rule 43(a), Federal Rules of Criminal Procedure and *Remmer v. United States*, 347 U.S. 227, 74 S. Ct. 450 (1954) to be present and participate in the decision to excuse said juror?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

Plaintiff-Appellee:

United States of America

Defendants-Appellants:

James J. Boutross
Martin Harris

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In the Supreme Court of the United States

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JAMES J. BOUTROSS
MARTIN HARRIS,

Petitioners,

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI

The Petitioners James J. Boutross and Martin Harris respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on June 10, 1992.

REFERENCE TO OPINIONS IN THE COURTS BELOW

The opinion in the United States Court of Appeals for the Ninth Circuit in this case styled *United States v.*

Boutross, et al is contained in an unpublished memorandum opinion, reprinted as "Appendix A" to this petition, at page A-1.

The order denying Petitioners' petition for rehearing and suggestion for rehearing en banc, entered by the United States Court of Appeals for the Ninth Circuit on July 30, 1992, is reprinted as "Appendix B" to this petition, at page B-1.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The opinion of the United States Court of Appeals for the Ninth Circuit which affirmed the convictions of Petitioners was filed on June 10, 1992.

A petition seeking rehearing by the panel and rehearing en banc which was timely filed by Petitioners herein was denied in an order entered at the direction of the court below on July 30, 1992.

Jurisdiction is conferred on this Court to review the aforesaid judgment of the United States Court of Appeals for the Ninth Circuit by the provisions of Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THIS CASE

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been

> previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Rule 23(b), Federal Rules of Criminal Procedure, provides:

> "(b) **Jury of Less Than Twelve**. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors ~~for~~ any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors."

Rule 43(a), Federal Rules of Criminal Procedure, provides:

> "(a) **Presence Required**. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule."

STATEMENT OF THE CASE

A. Procedural History

On November 14, 1990, the Petitioners were indicted by a federal grand jury in Los Angeles, California. The indictment was subsequently superseded on February 27, 1991. Petitioners were charged in fourteen counts with mail fraud (Title 18, United States Code, Section 1341; Counts 1-2), interstate transportation of stolen property (Title 18, United States Code, Section 2314; Count 3), and making false statements in loan and credit applications with federally-insured institutions (Title 18, United States Code, Section 1014, Counts 4-14).

The Petitioners were jointly tried before a jury between April 9, 1991 and May 2, 1991. Following the removal of one juror during deliberations, the reconstituted jury returned partial verdicts after five days of deliberations. The Petitioner Boutross was convicted on three of the fourteen counts (Counts 4, 11 and 14) and the jury hung on the remaining counts. The Petitioner Harris was convicted on six of the fourteen counts (Counts 4, 6, 7, 11, 13 and 14) and the jury hung on the remaining eight counts.

The trial court declared a mistrial on the counts for which the jury could not reach a verdict, and on July 12, 1991, each Petitioner was sentenced to a term of imprisonment of one year and one day on all but one count (to be served concurrently), to be followed by three years probation imposed on the remaining count of conviction. In addition, each Petitioner was ordered to make restitution in the amount of $23,000.

Petitioners appealed their convictions to the United States Court of Appeals for the Ninth Circuit. The convic-

tions were affirmed in an unpublished memorandum filed June 10, 1992, a copy of which is contained in Appendix "A" at page A-1. The petitioners filed a petition for rehearing and suggestion for rehearing en banc with the United States Court of Appeals for the Ninth Circuit. That petition was denied on July 30, 1992, with Circuit Judge Robert Boochever, one of the Judges on the original panel that affirmed the convictions, voting to have the case reheard en banc. A copy of the order denying rehearing and rehearing en banc is contained in Appendix "B" at page B-1.

B. Facts Material To Consideration Of The Issues Presented Herein

The Petitioner Boutross was the President of International Leasing Corporation ("ILC"), a company engaged in equipment leasing. The Petitioner Harris was the Vice-President of this same company. The business of ILC was to arrange financing for companies and individuals that sought to lease equipment for their businesses. ILC would either arrange for a lease directly with a lender (in this case federally-insured institutions) and receive a commission for acting as the broker in the transaction, or ILC would directly lease equipment to the lessee, having first purchased said equipment with funds borrowed from a lender.

ILC for the most part dealt with small savings and loan associations. These institutions requested that ILC submit to them completed credit and financial applications from the prospective lessees. Such credit and financial information included tax returns, financial statements and credit applications. The "lender" for the most part did not deal directly with the prospective lessees, except to make

sure that the lessees had received the equipment and were satisfied with same.

The indictment focused of five lease transactions entered into between ILC and various small businesses between November 1985 and February 1986. These transactions involved leases for medical equipment, office equipment, a printing press and gym equipment. The jury determined that in three of fourteen instances involving the Petitioner Boutross and in six of fourteen instances involving Petitioner Harris, the Petitioners had submitted information to lenders that they knew to be false at the time the information was submitted, in violation of Title 18, United States Code, Section 1014. This false information included a claim that a lessee had provided additional collateral for the lease when, in fact, no such collateral had been posted (Counts 4 and 11), an inflated estimate on the price of a printing press (Count 6), a false claim that a lessee had provided a check for the first and last lease payment (Counts 7 and 13) and a false claim that certain computer equipment pledged as collateral by the Petitioners on a business loan existed when, in fact, it did not (Count 14).

1. Removal Of Juror Cindy Schoonover

One of the jurors chosen to decide this case was Cindy Schoonover. Mrs. Schoonover disclosed during voir dire that she was the owner of a trucking company and that she was familiar with bank financing of truck purchases (Reporter's Transcript, pp. 52-54). After being advised of the nature of the charges contained in the indictment, Mrs. Schoonover advised the trial court that she could fairly and impartially decide the case.

On the ninth day of trial, the jury was instructed and retired to begin their deliberations. On the afternoon of the following day, April 25, 1991, a note was received by the trial court from the foreperson that stated as follows:

> "Juror number 9 [Mrs. Schoonover] feels that she may not in clear conscience impartially decide this case. She wants to be replaced by an alternate. Signed by Mrs. Brooks [foreperson]" (Reporter's Transcript, Vol. 10, p.3)

Upon receipt of the note, the court reconvened in the absence of the jury with all parties present. The transcript of these proceedings and the subsequent in camera voir dire of the juror are reprinted as "Appendix C" to this petition, at pages C-1 to C-31. The court stated that "obviously I've got to find out whether there is a significant reason why this juror should be excused" (Appendix C, p. C-1) The court solicited the suggestions of counsel for the Government and the Petitioners as to how to proceed. Counsel for Petitioner Boutross stated "I had a positive feeling with respect to that juror during the trial and during argument", and suggested that the court voir dire the juror. Counsel for Petitioner Harris joined in that suggestion (Appendix C, p. C-2). The trial court then advised counsel that it intended to take the juror into chambers with his courtroom clerk and court reporter and interview her outside the presence of the other jurors and counsel and "report my conclusions to counsel" (Appendix C, p. C-3).

Following this colloquy with counsel, the trial court invited the juror into chambers to be questioned on the reasons why she wanted to be excused as a juror. During this voir dire, Mrs. Schoonover told the court as follows:

1. Mrs. Schoonover advised the court that after she had started deliberations, "I suddenly felt that I could not honestly, in my heart, being a business owner myself, give an honest verdict . . . I don't want to say that I would take their side, but yet feelings inside say that I would, because myself being a business owner. I don't want to say anything that will incriminate me. . ." (Appendix C, p. C-7).

2. In response to further inquiry by the court as to whether or not "it's your outside experiences which are causing this feeling you're describing or something in the evidence you've heard" (Appendix C, p. C-8), Mrs. Schoonover indicated that her feelings were caused *by the manner in which she viewed the evidence*:

> "Well, I guess the best way to sum that up is, which I believe is the legal way to break every thing down into pieces and look at it piece by piece. I'm having a hard time at that because I'm looking at the overall picture.
>
> Things came up this morning where I was asked to give my opinion one way or the other and I was having a hard time giving my opinion that way when that isn't or maybe wouldn't be my opinion on the overall picture." (Appendix C, p. C-9)

3. When the court inquired further of Mrs. Schoonover and asked her if the "problem" was "that you're looking at the case perhaps differently or at least approaching it differently than other jurors?" (Appendix C, p. C-10), Mrs. Schoonover answered in the affirmative:

> "I think my opinion of the case is different. Especially when there is one particular topic or piece of evidence that came up today that I had to give my opinion on, and I couldn't because it had to do with a check and — see, it's hard for me because I don't know how much I can say and how much I can't say here—." (Appendix C, p. C-10)

4. In response to further inquiry from the court, Mrs. Schoonover stated:

> "I just don't feel that I could put the rope around somebody's neck, they've been accused of doing things that I've done myself in my own business and I would not feel good about accusing someone of things that I have done myself and never been accused of." (Appendix C, p. C-12)

5. After this last comment, and with no notice to Petitioners or their counsel, the court excused Mrs. Schoonover from further jury duty. The court asked Mrs. Schoonover if she had any objection to the court advising counsel for the Petitioners that the reason she had been excused was because "you have had prior business experiences yourself which you think would impermissably [sic] affect your way of looking at the evidence" (Appendix C, p. C-14). Mrs. Schoonover told the court that she had no objection to advising counsel for the Petitioners as to why the court had excused her, and would not object if the court told counsel "*I don't feel that the defendants are guilty*" (Appendix C, p. C-15). The court told Mrs. Schoonover "I don't think I want to tell them how you think about the case or how any other jurors think about the case. . . because that's supposed

to remain confidential within the jury room" (Appendix C, p. C-15).

2. "Waiver" Of Petitioners' Presence When Juror Removed

The note from the foreperson stating that Mrs. Schoonover wanted to be excused from further jury duty came after almost one day of deliberations by the jury. At the time, counsel for the Petitioners expressed their reservations about excusing this juror, stating they viewed the juror as a favorable juror for the defense (Appendix C, p. C-2).

Counsel for the Petitioners agreed that the court should voir dire the juror to determine why she wanted to be excused from jury duty. The court advised counsel and their clients that it would take the juror into chambers with the courtroom clerk and court reporter and "make a record of what's said, but interview her outside the presence of the other jurors and counsel" (Appendix C, p. C-3). The court went on to state that it intended to "interview her and *report my conclusions to counsel*" (Appendix C, p. C-3).

The court rejected the suggestion of counsel for Petitioner Boutross that it report back to counsel its questions and the juror's answers thereto, and allow counsel to pose additional follow-up questions (Appendix C, pp. C-3 to C-4). Counsel then agreed to the original proposal of allowing the court to conduct the interview and have the court report back its findings:

> "MR. JAMES (counsel for Petitioner Harris): I concur on your procedure, Your Honor. I think that [the court's voir dire] should be in chambers without counsel.

> MR. NEWTON (counsel for Petitioner Boutross): I agree.
>
> MR. JAMES: Otherwise it's too intimidating and *I think you can report back what you—*
>
> THE COURT: All right. Do you agree?
>
> MR. NEWTON: I agree. (Appendix C, pp. 4-5)

After the in camera voir dire examination of Mrs. Schoonover, and after the court excused her from service, the court returned to the courtroom and advised counsel for the Petitioners that the court had excused Mrs. Schoonover. The court did not tell counsel that Mrs. Schoonover had stated she did not feel the defendants were guilty. Instead, counsel was advised as follows:

> "What in essence without getting into the particulars that Mrs. Schoonover told me is that she has had business experiences of her own in business that are — have some similarity to some of the things that are in evidence in this case. And that she feels very uncomfortable and she feels it would affect unduly her judgment if she were to attempt to reach a decision in this case with her knowledge of her own business experiences.
>
> She said that she didn't from the initial description of the case at the time of the voir dire, she didn't recognize this, and in fact, she didn't fully realize it until jurors started talking about some of the particular problems of the case and then she recog-

> nized that she had had similar experiences on her own.
>
> I think she is not asking to be excused because she is in disagreement with the other jurors or that there has been any fight or disagreement in the jury room. I'm satisfied that that is the case. I'm satisfied that her — her statement is genuine and sincere and that she feels that she could not be a fair and impartial juror because of her prior experience." (Appendix C, p. C-17)

Upon learning that the juror had been excused and because counsel did not know why the juror had been excused and because the "Court didn't canvas opinions in advance of the defense whether or not we would agree to the excusal" (Appendix C, p. C-18), counsel for the Petitioners immediately lodged their objection to the juror's removal and moved for a mistrial (Appendix C, pp. C-19 to C-20).

REASONS RELIED ON FOR GRANTING THE WRIT

I

THE DISMISSAL OF THE JUROR DEPRIVED THE THE PETITIONERS OF THEIR CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT

The memorandum decision of the United States Court of Appeals for the Ninth Circuit in this case is in conflict with the decision of the United States Court of Appeals for the District of Columbia Circuit in *United States v. Brown*, 823 F.2d 591 (D.C. Cir. 1987). In the

Brown case, the defendants were charged with violating the RICO laws, Title 18, United States Code, Section 1962 *et seq*. After thirteen weeks of trial and five weeks of jury deliberations, one of the juror's sent the court a note stating: "I Bernard Spriggs am not able to discharge my duties as a member of the jury." *Id.* at 594. After receiving this note, the court conducted a voir dire examination of the juror, with the defendants and their counsel present but not participating. The relevant portion of the colloquy between the court and the juror was as follows:

> "COURT: And, is that what you mean when you say you're not able to discharge your duties, because you can't follow the law? You disagree with the law? And if you had known more clearly what the law said—
>
> SPRIGGS: Yes.
>
> COURT: — You would have indicated on the voir dire—
>
> SPRIGGS: Yes, sir; Yes, sir.
>
> COURT: — When I asked you that question, would you follow the court's instructions, you would have said 'No, because I don't like the law'?
>
> SPRIGGS: *It's the way it's written and the way the evidence was presented.*
>
> COURT: If the law were different, maybe you could go along — but your understanding —
>
> SPRIGGS: *If the evidence was presented in a fashion in which the law is written, then*

> *maybe, I would be able to discharge my duties...*" *Id.*, at 594.

On the basis of this juror's answers, the court in *Brown* dismissed the juror on the ground that his disagreement with the law prevented him from discharging his duties as a juror. On appeal, the United States Court of Appeals for the District of Columbia Circuit rejected the argument that the excusal was within the discretion of the trial judge under Rule 23(b), Federal Rules of Criminal Procedure, and held that the paramount command of the Sixth Amendment right to a unanimous verdict had been violated because the juror had not only indicated an inability or unwillingness to apply and follow the law as instructed by the court, but had *also* indicated doubts as to the sufficiency of the evidence:

> "We agree with the appellants that a court may not dismiss a juror during deliberations if the request for discharge stems from doubts the juror harbors about the sufficiency of the government's evidence. Indeed, we think that this part of the appellant's argument is scarcely debateable. If a court could discharge a juror on the basis of such a request, then the right to a unanimous verdict would be illusory. A discharge of this kind would enable the government to obtain a conviction even though a member of the jury that began deliberations thought that the government had failed to prove its case. Such a result is unacceptable under the Constitution. Thus, when a request for dismissal stems from the juror's view of the

> sufficiency of the evidence that the government offered at trial, a judge may not discharge the juror: the judge must either declare a mistrial or send the juror back to deliberations with instructions that the jury continue to attempt to reach agreement." *Id.*, at 596.

In the instant case, the United States Court of Appeals for the Ninth Circuit chose to characterize the reasons for the juror's request to be dismissed in terms of bias and impartiality. By characterizing her request as such, the Court of Appeals placed the court's action squarely within the parameters of Rule 23(b), Federal Rules of Criminal Procedure, which provides that the trial court may excuse a juror during deliberations for "just cause". Bias and impartiality is just cause for dismissal of a juror. *Bayramoglu v. Estrelle*, 806 F.2d 880, 887 (9th Cir. 1986); *United States v. Baca*, 494 F.2d 424, 429 (10th Cir. 1974).

The decision of the United States Court of Appeals for the Ninth Circuit fails, however, to take into account the following comments of Mrs. Schoonover's colloquy with the court:

1. After stating that she did not feel she could give an "honest" verdict because she, like the Petitioners, was a business owner, Mrs. Schoonover told the court her reasoning:

> ". . . I'm having a hard time at that because *I'm looking at the overall picture*. Things came up this morning where I was asked to give my opinion one way or the other and I was having a hard time giving my opinion that way when that isn't or maybe wouldn't

be my opinion on the overall picture. . ." (Appendix C, p. 9)

2. The "thing" that came up that morning during deliberations which bothered Mrs. Schoonover was a discussion of those counts pertaining to the Petitioner's alleged false statements concerning checks. The Petitioners were charged with making false statements to insured lending institutions to the effect that they had received a first and last month's payment on certain leases. Part of the defense put forth by Petitioners were such statements, if made, would have been immaterial to the transaction. Mrs. Schoonover apparently had a difference of opinion with other jurors during deliberations on this subject:

> "I think my opinion of the case is different. Especially when there is one particular topic or piece of evidence that came up today that I had to give my opinion on, and I couldn't because it had to do with a check and — see, its hard for me because I don't know how much I can say and how much I can't say here." (Appendix C, p. 10)

3. Mrs. Schoonover indicated that as a business person, she had conducted business in a manner similar to the Petitioners. She stated she didn't want to put a "rope around somebody's neck" for doing things she had done herself. In describing this attitude, Mrs. Schoonover *did not* offer any opinion as to the lawfulness of the conduct she was describing. If others viewed the business practices of the Petitioners as somehow illegal, she was certainly entitled to cast her vote with the Petitioners and state that such practices were not, in her opinion, criminal. During this particular colloquy, she was careful to note that the

Petitioners had only been "accused" of doing things she also did (Appendix C, p. C-12)

4. The opinion totally ignores the fact that the juror, when told by the court that he would offer as an explanation for her excusal the fact that her prior business experiences would impermissably affect the way she looked at the evidence, advised the court that it could also advise the Petitioners that *the juror did not think they were guilty* (Appendix C, p. 15).

The decision of the United States Court of Appeals for the Ninth Circuit was correct if it can be clearly and unequivocally stated that Mrs. Schoonover wanted off the jury *solely* because of her bias in favor of the Petitioners because she also was a business person. The decision of the Court of Appeals can not stand, however, if there is "any possibility" that Mrs. Schoonover, in addition to having a defense bias based upon her own business experiences, also believed that the Petitioners were not guilty of any crime. Such a possibility clearly exists from the comments of the juror that (1) she thought the Petitioners were not guilty, and (2) based upon her own prior business experience, when viewing the "overall" picture she came to a different opinion of the evidence than the other jurors. This "overall" view of the evidence may well have been to the effect that if Petitioners made any false statements, they were not important nor material to the decision of the lending institution to make a loan on a particular transaction, a point argued by the Petitioners during trial. Because she had a different opinion from at least some of the other jurors, she felt that she must be wrong and the other jurors right. Accordingly, this juror sought the easy way out. In the process, the Petitioners lost their right to a unanimous jury.

There is an argument that can be made that the colloquy reveals bias and prejudice on the part of the juror which, if known at the time of voir dire, would have permitted the court to excuse her for cause. Of course, it must also be remembered that the court advised the entire jury during voir dire of the nature of the charges contained in the indictment. The juror did not express any problems with the case until a difference of opinion arose during deliberations on how to view the evidence. There is also an equally strong argument that can be made that Mrs. Schoonover did not feel that the business practices engaged in by these Petitioners were criminal. Her statement that, based on her own business background, she tended to look at the "overall picture" instead of breaking the evidence down into bits and pieces is hardly an indictment of her prejudice and bias. The indictment charged the Petitioners with crimes arising out of the way they conducted business. They were entitled to have someone who truly was one of their "peers" on the jury that passed judgment on them.

The fact a potential ambiguity exists in the comments made by Mrs. Schoonover is understandable. The trial court could not inquire further without impermissably delving into her thought processes while deliberating the fate of these Petitioners. The ambiguity may also reflect the less than overwhelming evidence extant in the case. It is not insignificant in reviewing this case to remember that the jury hung on the majority of the charges against both Petitioners.

The memorandum decision is incorrect when it unequivocally states that Mrs. Schoonover's dismissal was based solely on her bias and impartiality. One simply cannot reconcile this claim with her statement that she

viewed the evidence differently than other jurors and did not think the Petitioners were guilty of the crimes with which they were charged. Given this ambiguity, the Court of Appeals for the Ninth Circuit should have applied the constitutional standard set forth in the *Brown* decision. The holding in that case seems prophetic, given the facts of this case:

> "We must . . . confront the problem that the reasons underlying a request for a dismissal will often be unclear. As the district court in this case aptly noted, a court may not delve deeply into a juror's motivations because it may not intrude on the secrecy of the jury's deliberations. Thus, unless the initial request for dismissal is transparent, the court will likely prove unable to establish conclusively the reasons underlying it. Given these circumstances, we must hold that *if the record evidence discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request.* . . . We may not be able to say for a certainty that Spriggs desire to leave the jury stemmed from his view of the adequacy of the government's evidence. But we cannot say with any conviction that Sprigg's request to be dismissed stemmed from something *other* than this view. Given the possibility — which in this case is a likelihood — that Sprigg's desire to quit deliberations stemmed from his belief that the evidence was inadequate to support a conviction, we must find

that his dismissal violated the appellants' rights to a unanimous verdict. *Id.*, at 597.

II

THE PETITIONERS DID NOT WAIVE THEIR RIGHT TO BE PRESENT WHEN THE COURT DISMISSED THE JUROR

Rule 43(a) of the Federal Rules of Criminal Procedure provides, in relevant part, as follows:

> "The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence. . ."

In the opinion of the Court of Appeals for the Ninth Circuit, the colloquy of counsel for Petitioners and the trial court is quoted to support the proposition that counsel waived the Petitioners right to be present when the juror was excused from service. Counsel for Petitioners respectfully assert that they did not waive their clients' right to be present when the juror was dismissed, and that it was error to excuse the juror in the absence of counsel and their clients and absent their consent. *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450 (1954). The portion of the transcript quoted in the opinion dealt only with counsel waiving their right to be present during the in camera voir dire of the juror. Counsel *did not* waive, nor did they anticipate that the court would sua sponte discharge the juror without counsel and their clients being present to make any arguments for or against such a procedure.

A review of the transcript in Appendix C bears this out:

1. When the note from the jury was received, counsel for Boutross stated that the court should voir dire the juror to determine the reasons for her request to be dismissed (Appendix C, p. 2). In making that recommendation, counsel stated that he was of the opinion that the juror was a pro-defense juror (Appendix C, p. 2).

2. The court stated that it would take the juror into chambers with the reporter and courtroom clerk and "make a record of what's said, but interview her outside the presence of the other jurors and counsel" (Appendix C, p. 3). The court further stated that it would "interview her and *report my conclusions to counsel*" (Appendix C, p. 3). Counsel for petitioners agreed to this procedure, i.e., conducting the voir dire of Mrs. Schoonover to determine why she wanted to be excused in camera.

3. The court rejected the suggestion that counsel be present in chambers and that they be allowed to ask follow-up questions. Counsel agreed with the court that this might prove to be too intimidating to the juror. The colloquy which ended this discussion, and which is not quoted in the opinion, was as follows:

> "MR. JAMES: I concur on your procedure, Your Honor. I think that it [voir dire of Mrs. Schoonover] should be in chambers without counsel.
>
> MR. NEWTON: I agree.
>
> MR. JAMES: Otherwise it's too intimidating and *I think you can report back what you*—
>
> THE COURT: All right. Do you agree?

MR. NEWTON: I agree." (Appendix C, pp. 4-5)

After the court dismissed the juror in chambers, the court took the bench and advised counsel for the petitioners of his action (Appendix C, p. 17). Upon learning of juror's removal, counsel for the Petitioners immediately lodged their objections:

> "[THE COURT]: . . . Mr. Newton, you expressed some substantial reservations about that course before — just as the jury was starting to come in. Let me hear you out on this.
>
> MR. NEWTON: I don't want to leave the first issue yet, Your Honor. Your Honor has excused the juror. I think I have to make an objection to that.
>
> THE COURT: Oh you do? Okay. Why so?
>
> MR. NEWTON: First off, as I indicated, I believed that juror was probably a good juror for the defense and other then [sic] the Court's comment just now, I really don't know any more about the basis for the excusal, but since the Court didn't canvas opinions in advance of the defense whether or not we would agree to the excusal, to protect my client and to protect my record, Your Honor, I just have to object. . ." (Appendix C, p. 18).

The opinion by the Court of Appeals states that "the record does not support" the claim that counsel for the Petitioners believed the court would report its finding to

counsel prior to any excusal of the juror. This conclusion clearly is erroneous. The court itself specifically stated it would report its conclusions to counsel after the voir dire of the juror.

CONCLUSION

The case at bar is an appropriate one for granting the writ because:

1. The issue of whether or not the decision of the United States Court of Appeals for the Ninth Circuit is in conflict with the decision of the United States Court of Appeals for the District of Columbia Circuit in *United States v. Brown*, 823 F.2d 591 (D.C. Cir. 1987) is an important question which should be clarified. The Ninth Circuit Court of Appeals has applied an abuse of discretion standard to the removal of a juror pursuant to Rule 23(a) of the Federal Rules of Criminal Procedure. The District of Columbia Court of Appeals has held in a strikingly similar context that the Sixth Amendment's provision for a unanimous verdict supersedes the provisions of Rule 23(a). The standard enunciated in *Brown* that forbids removal of a juror if there is "any possibility" a juror is requesting to be excused based upon their view of the sufficiency of the evidence was rejected by the Ninth Circuit Court of Appeals.

2. The Petitioners were denied their right to be present and present argument to the trial court at the time the juror was dismissed. The removal of the juror was done in camera without the knowledge or consent of Petitioners or their counsel and in contravention of this Court's holding in *Remmer v. United States*, 347 U.S. 227, 74 S. Ct. 450 (1954).

Wherefore, Petitioners respectfully pray that the writ to the United States Court of Appeals for the Ninth Circuit issue.

Respectfully submitted,

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APPENDICES

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APPENDIX A

FILED

JUN 10 1992

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES J. BOUTROSS, Defendant-Appellant.	No. 91-50430 DC No. CR-90 -0868-HLH-1 MEMORANDUM*
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARTIN HARRIS, Defendant-Appellant.	No. 91-50442 DC No. CR-90 -0868-HLH-2 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding
Argued and Submitted June 3, 1992
Pasadena, California

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Circuit. R. 36-3.

Before: D.W. NELSON, BOOCHEVER, and THOMPSON, Circuit Judges.

James Boutross and Martin Harris appeal their jury convictions for making false statements in loan and credit applications, in violation of 18 U.S.C. § 1014. We affirm the convictions.

I.

Boutross and Harris argue that the district judge's dismissal of juror Schoonover deprived them of their Sixth Amendment right to a unanimous jury. We review a district court's decision to excuse a juror under Fed. R. Crim. P. 23(b) for an abuse of discretion. United States v. Ross, 886 F.2d 264, 266-67 (9th Cir. 1989), cert. denied, 494 U.S. 1083 (1990).

Under Rule 23(b), a court may exercise its discretion to excuse a juror for "just cause." Jurors are obligated to consider only the evidence which is presented to them in open court. Bayramoglu v. Estelle, 806 F.2d 880, 887 (9th Cir. 1986). Hence, the existence of juror bias may constitute just cause for that juror's excusal. (See generally id. at 888 (existence of juror bias may violate a defendant's Sixth Amendment right to a fair and impartial trial).

The record here indicates that there was just cause for the district court's dismissal of Schoonover. First, Schoonover believed she could not be an impartial juror. A note from the foreperson informed the court that Schoonover felt she could not "in clear conscience impartially decide this case." See R.T. at 3.[1] During her in camera interview, she confirmed that she could not "give an honest

[1] "R.T." refers to the Reporter's Transcript, April 25, 1991.

verdict," R.T. at 9, and that her prior experiences would cause her to, in effect, disregard the evidence. Cf. United States v. Baca, 494 F.2d 424, 429 (10th Cir. 1974) (observing that when juror "unequivocally stated that she could no longer hear and decide the case fairly and impartially that the [district] Court had no recourse but to excuse her from further jury service.").

Second, this self-professed partiality or bias stemmed from Schoonover's belief that she had committed some of the acts for which Boutross and Harris were being tried. Initially, she pointed to a somewhat general reason for her lack of impartiality: ". . . I could not honestly, in my heart, being a business owner myself, give an honest verdict." R.T. at 9. Only after indicating, however, that she did not "want to say anything that will incriminate me," R.T. at 10, and being assured twice that her statements would not incriminate her, she told the court:

> I just don't feel that I could put the rope around somebody's neck, they've been accused of doing things that I've done myself in my own business and I would not feel good about accusing someone of things that I have done myself and never been accused of.

R.T. at 15.

"A court must excuse a prospective juror if actual bias is discovered during voir dire." United States v. Allsup, 556 F.2d 68, 71 (9th Cir. 1977). During voir dire, Schoonover apparently did not recognize from the initial description of the case that she had had business experiences similar to some of the conduct in evidence in the case. See R.T. at 20. Notwithstanding this belated recognition, we might be less

convinced of just cause for her dismissal had she believed that she could remain fair and impartial. Cf. Bayramoglu, 806 F.2d at 887-88 (rejecting defendant's claim that one juror's misconduct tainted the entire jury's mpxity, in light of significant fact that jurors assured the court that they could disregard the misconduct). Here, however, there was more than the mere possibility that the juror's mpxity would be affected adversely by the similarity between her prior acts and the acts for which the defendants were accused: the juror unequivocally stated that she could not give an honest verdict. The district court, therefore, did not abuse its discretion in finding just cause to excuse Schoonover.

Citing United States v. Brown, 823 F.2d 591 (D.C. Cir. 1987), however, defendants contend that other evidence indicated that Schoonover sought to be excused because she believed that the Government's evidence was insufficient. In light of this possibility, they argue that Schoonover's dismissal violated their Sixth Amendment right to a unanimous jury verdict. We disagree.

In Brown, a juror stated that he could not fulfill his duties as a juror, citing his disagreement with the RICO law and, alter, with "the way the evidence has been presented." Id. at 594. The district court indicated that the juror's reasons for seeking relief from his juror duty were unclear. Deciding, however, that further inquiry would jeopardize the secrecy of the jury's deliberations, the court discharged the juror under Rule 23(b) on the basis that he would not follow the RICO law. Id. at 595. The D.C. Circuit reversed. Observing that the juror had also expressed doubts about the evidence, it held that "if the record evidence discloses any possibility that the request to discharge stems from the

juror's view of the sufficiency of the government's evidence, the court must deny the request" for the juror's dismissal. Id. at 596.

As the Government points out, however, the facts in Brown differ significantly from the facts at bar. First, the juror's note in Brown appeared after five weeks of deliberations and after another note had suggested a jury deadlock. In contrast, Schoonover asked to be excused on the first day of jury deliberations, and repeatedly assured the district court that her request did not stem from disagreement with fellow jurors. No evidence in the record remotely suggests that the jury had deadlocked on any of the counts when Schoonover was dismissed — a situation which would have presented a much stronger case that the defendants' right to a unanimous verdict had been jeopardized. Cf. ucc v. Hernandez, 862 F.2d 17, 22 (2d Cir. 1988) (reversing conviction in part due to removal of sole hold-out for acquittal), cert. denied sub nom. Quinones v. United States, 489 U.S. 1032 (1989).

Second, the Brown record indicated "a substantial possibility" that the juror's discharge request stemmed from his belief that the Government's evidence was insufficient. Id. at 596. Here, the record indicated that Schoonover wished to be excused because she recognized that the defendants were being "accused of doing things that I've done myself in my own business." R.T. at 15. Examining the entirety of the Schoonover interview and the district court's discussions with counsel, we are satisfied that the record is clear that the problem was not that Schoonover considered the evidence and found it insufficient, but that her own prior experiences wre causing her to "in effect disregard the evidence." R.T. at 15 (emphasis added). See,

e.g., R.T. 15-16 (Schoonover explaining that she would "feel like a hypocrite.").

In resolving issues of juror impartiality, we have long recognized that the trial judge is in the best position to evaluate the juror's testimony, credibility, and ability to fulfill her duty as a juror. See Ross, 886 F.2d at 267. Because the record does not present "even the slightest basis" to believe that Schoonover was excused on a pretext in order to reach a unanimous verdict, see United States v. Stratton, 779 F.2d 820, 832 (2d Cir. 1985), cert. denied, 476 U.S. 1162, and 477 U.S. 906 (1986), we conclude that the district court did not abuse its discretion in finding just cause to dismiss Schoonover under Rule 23(b).

II.

Defendants also argue that the procedures employed in excusing juror Schoonover violated their right to be present at every stage of the trial pursuant to Fed. R. Crim. P. 43(a). Rule 43(a) provides:

> The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

We find defendants' contention to be without merit. The record clearly indicates that upon learning about Schoonover's request to be excused, Judge Hupp first asked counsel how best to proceed, and that Mr. Newton, counsel for defendant Boutross, responded by proposing that the court voir dire the juror. Mr. James, counsel for defendant Harris, concurred.

Defendants nonetheless claim that their counsel "clearly anticipated . . . that the court would report its findings to counsel before any decision was made, and certainly prior to the excusal and departure of the juror from the courthouse." Def. Br. at 44. Such a report, they argue, would have afforded them the opportunity to suggest further questions to Schoonover.

The record does not support these assertions. The district judge suggested that he would conduct an in camera interview of Schoonover and would report his conclusions to counsel, to minimize the possibility of improper disclosure of jury deliberations:

> COURT: Do you — do you want to give it a thought for a minute?
>
> NEWTON: Well, no, no. I -- I think that the Court is handling it in an appropriate fashion with perhaps one caveat. Perhaps after you've had the interview with her, then perhaps you could send her back and your recorder could read to us the questions and the answers in the event that there might be a follow-up that we would want to suggest that the Court might put to her. That's the only -- that's the only thing.
>
> COURT: If -- if I do that, I might as we might as well have you in the room at the same time.
>
> NEWTON: Your Honor --

COURT: What I'm concerned about is her inadvertently revealing a portion of the jury's deliberations.

NEWTON: Well, I, you know --

COURT: I do have in mind preserving the records in case I'm -- if I make a bad judgment, you've -- you've got a record on it.

NEWTON: All right.

COURT: But --

NEWTON: It puts you in the hot seat, Your Honor, but --

COURT: Yes, it does.

NEWTON: -- I think -- I agree --

JAMES: I concur on your procedure, Your Honor. I think that should be in chambers without counsel.

NEWTON: I agree.

R.T. at 5-6 (emphasis added).

The record demonstrates that defense counsel expressly agreed to their exclusion from the Schoonover interview, that they waived the opportunity to submit further questions to Schoonover, and that they recognized that Judge Hupp might be required to make a judgment regarding excusal on his own. Cf. Remmer v. United States, 347 U.S. 227, 228-30 (1954) (requiring hearing for all interested parties where defense counsel were completely unaware of the alleged jury tampering and the subsequent F.B.I. investigation of a juror). Such

stipulation amounts to a waiver of the defendants' right to be present during the in-chambers interview of Schoonover and the decision to excuse her. See United States v. McClendon, 782 F.2d 785, 788-89 (9th Cir. 1986) (defendants' failure to object to their exclusion from in-chambers voir dire of prospective jurors waived their right to be present under Rule 43 (a)). Accordingly, we find that the defendants waived their right to be present when the court questioned Schoonover and decided to excuse her.

The convictions of Boutross and Harris are AFFIRMED.

APPENDIX B

FILED
JUL 30 1992
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES J. BOUTROSS, Defendant-Appellant.	No. 91-50430 DC No. CR-90 -0868-HLH-1
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARTIN HARRIS, Defendant-Appellant.	No. 91-50442 DC No. CR-90 -0868-HLH-2 ORDER

Before: D.W. NELSON, BOOCHEVER, and THOMPSON, Circuit Judges.

The juror's statement that she did not believe the defendants were guilty has little, if any, bearing on whether the juror's dismissal was improper because this statement was made after the district court had already decided to excuse her. See R.T. at 16-18. Hence, this statement could not have served as a basis for the district court's dismissal of the juror.

The panel has voted to deny the petition for rehearing. Judges D.W. Nelson and Thompson reject the suggestion for rehearing en banc and Judge Boochever so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

PROCEEDINGS BEGIN AT 2:20 P.M.
(Court is Called to Order)

THE COURT: All right. The United States against Boutross and Harris. Record show we're outside the presence of the jury. Defendants and counsel are present.

Counsel, I won't bother discussing the note where they want more coffee. I have this note which is a little bit unique and unusual in my experience, it reads:

Juror number 9 feels that she may not in clear conscience mpxity decide this case. She wants to be replaced by an alternate. Signed by Ms. Brooks and Ms. Brooks, Juryman 11 is the foreman.

The -- obviously I've got to find out whether there is a significant reason why this juror should be excused and whether there is an agreement that if she should be excused, an alternate may replace her.

I've got to find out whether there is a problem, just a disagreement among the jurors, which have lead to some, in effect, statement, well, if that's the way you feel about it, I'll get off the jury, or whether, in fact, it's a -- there is a legitimate reason which the juror has not revealed earlier why she is -- cannot be considered impartial. By the way, the juror is juror number 9, that's Mrs. Schoonover in the third seat in the second row.

Well, let me get the counsel's view. Government have a view on this?

MR. ISAACS: I think what Your Honor is outlined is probably correct. It's just a matter of disagreements and I don't think that would be grounds for an -- to excuse her, however if it's something extraneous, then it's a problem of a different nature so we would concur in what Your Honor's outlined.

THE COURT: What do you think Mr. Newton? You ever run into this one before?

MR. NEWTON: Never have Your Honor.

THE COURT: Neither have I.

MR. NEWTON: This is --

MR. JAMES: It's always something new.

MR. NEWTON: My -- I've got nothing to based this on, but quite frankly, I had a positive feeling with respect to that juror during the trial and during argument. And I agree with Mr. Isaacs, if what this simply reflects is some heated disagreements, immediate polarizing of positions in deliberations, that's not really grounds to excuse her.

If it's something extranesous that would have been challengeable for cause that no one was aware of prior to the trial beginning, I think that's different. And I think that what the Court has to do in all probability is voir dire that juror.

THE COURT: What do you think Mr. James?

MR. JAMES: I concur in what he just said.

THE COURT: Okay.

MR. NEWTON: We just need a record.

THE COURT: Well, let me suggest this. Let's see if counsel see a problem with this as a way of approaching the problem that I take the juror into chambers with Ms. Borgarding and are recorder to make a record of what's said, but interview her outside the presence of the other jurors and counsel.

The reason I say and counsel was -- it's possible she may reveal something about their deliberations which should not be revealed. I'm going to discourage her from doing that, so, because I -- she's not supposed to tell me either, but interview her and report my conclusions to counsel. What to you think, Mr. Isaacs? Ms. Lum?

MR. ISAACS: We would stipulate that Your Honor.

THE COURT: Mr. Newton?

MR. NEWTON: I would agree --

THE COURT: Do you -- do you want to give it a thought for a minute?

MR. NEWTON: Well, no, no. I -- I think that the Court is handling it in an appropriate fashion with perhaps one caveat. Perhaps after you've had the interview with her, then perhaps you could send her back and your recorder could read to us the questions and the answers in the event that there might be a follow-up that we would want to suggest that the Court might put to her. That's the only -- that's the only thing.

THE COURT: If -- if I do that, I might as well have you in the room at the same time.

MR. NEWTON: Your Honor --

THE COURT: What I'm concerned about is her inadvertently revealing a portion of the jury's deliberations.

MR. NEWTON: Well, I, you know --

THE COURT: I do have in mind preserving the records in case I'm -- if I make a bad judgment, you've -- you've got a record on it.

MR. NEWTON: All right.

THE COURT: I do have in mind preserving the records in case I'm -- if I make a bad judgment, you've -- you've got a record on it.

MR NEWTON: All right.

THE COURT: But --

MR. NEWTON: It puts you in the hot seat, Your Honor, but --

THE COURT: Yes, it does.

MR. NEWTON: -- I think -- I agree --

THE COURT: I plan to take -- I plan to take Ms. Borgarding in and Ms. Worthen in as my chaperons here.

MR. NEWTON: Imminently qualified.

MR. JAMES: I concur on your procedure, Your Honor. I think that should be in chambers without counsel.

MR. NEWTON: I agree.

MR. JAMES: Otherwise it's too intimidating and I think you can report back what you --

THE COURT: All right. Do you agree?

MR. NEWTON: I agree.

THE COURT: Do you agree?

MR. ISAACS: Yes sir.

MS. LUM: Yes, Your Honor.

THE COURT: All right. I'll do it. I'll ask Ms. Borgarding to see if she can extract Mrs. Schoonover from the jury room. I think I better get them down here. Ask -- tell them what I'm going to do, send the rest of them back, tell them not to deliberate with only eleven of them there, and have Mrs. Schoonover come into chambers.

All right, would you bring the jury down then.

(Pause)

THE COURT: Let me ask counsel this. If I believe after hearing Mrs. Schoonover that it's necessary to excuse her from the jury, is it counsel's contemplation that I would then summon the number one alternate who is Mr. Walter, install him in Mrs. Schoonover place on the jury, and direct them to start their deliberations anew from the beginning?

MR. NEWTON: Your Honor can take a verdict with eleven.

THE COURT: I could, but we've hung on to the two alternates for this purpose.

MR. NEWTON: As between restarting the deliberations or putting in the alternate, I would quite frankly prefer to take it with eleven.

THE COURT: All right. Tell you what, I'm going to let counsel think about it then and I won't determine it just now.

(Jury Enters at 2:26 P.M.)

THE COURT: This is United States against Boutross, the jury is present. Good afternoon ladies and gentlemen. I have Ms. Brooks' note and what I would like to do is this. I would like to have juror number nine, Mrs. Schoonover come into chambers with the clerk and the recorder and me, but outside the presence of the lawyers, and -- so that I may inquire as to the basis for the -- the request to be excused.

In the meantime, I'll ask the rest of the jurors not to deliberate or not to discuss the case until we get -- until I give you the go ahead again. So, if the rest of the jurors can retire to the jury room, Mrs. Schoonover, if you could come on into chambers and we'll -- let me have a talk with you.

(Court and Court Recorder Confer)

(Jury Exits at 2:29 P.M.)

IN CAMERA DISCUSSION

THE COURT: For the record, I'm in Chambers with Mrs. Cindy Schoonover, juror number nine, and Ms. Borgarding and Ms. Worthen, the court recorder.

I got this note from the foreperson, juror number nine feels that she may not in clear conscience impartially decide this case. She wants to be replaced by an alternate. Signed by Ms. Brooks.

One of the reasons I need to inquire is to make sure that this didn't come about because of some disagreement in the jury room --

MS. SCHOONOVER: No, heavens no. As the very beginning, you asked each and every one of us if we could be a fair and impartial juror.

THE COURT: Right.

MS. SCHOONOVER: At that time, I said yes. After everything was finished, the evidence was out, the witnesses had spoke, the attorney's closing arguments and we started deliberating this morning, going through some of the evidence, I suddenly felt that I could not honestly, in my heart, being a business owner myself, give an honest verdict.

There -- the defendants are business owners such as myself --

THE COURT: Okay.

MS. SCHOONOVER: -- and I look at it as kind of one business owner to another. I don't want to say that I would take their side, but yet feelings inside say that I would, because myself being a busines owner. I don't want to say anything that will incriminate me as far as --

THE COURT: Nothing is going to incriminate you. There is a question of whether I will find the reason sufficient to excuse you or not.

MS. SCHOONOVER: Right.

THE COURT: And that's why I'm making this inquiry. But you don't need to be afraid being --

MS. SCHOONOVER: Okay.

THE COURT: -- incriminating yourself. Now, what I -- what I want to find out is whether it's your outside experiences which are causing this feeling you've describing or something in the evidence you've heard.

Here's the reason I asked the question. If the thought or attitude comes about because you perceive the evidence in a certain way, then that's part of a normal function of a juror.

MS. SCHOONOVER: Right.

THE COURT: On the other hand, if there is something about your thoughts because of your prior experiences in the world --

MS. SCHOONOVER: Right.

THE COURT: -- which has caused you to have a feeling that you can't address the evidence impartially, then that's another thing.

Also, if there is a problem of disagreement in the jury room which has come up and if there is, I don't really want you to tell me --

MS. SCHOONOVER: Right, exactly.

THE COURT: -- about that. Disagreement among jurors as to how to approach a case is a normal part of the process and we hope the jurors can talk it through and we ask them to try very hard to do so, but if there is disagreement, some jurors have used strong language which have made you feel you feel badly because they aren't agreeing with you, then that's another --

MS. SCHOONOVER: Right.

THE COURT: -- another thing. We would ask jurors to keep trying to do their best in that case, even though there's apparent disagreement.

MS. SCHOONOVER: Right.

THE COURT: Now, I sort of laid out a menu here of possibilities and maybe there are other possibilities.

MS. SCHOONOVER: Right.

THE COURT: Try to describe for me as best as you can without telling me what you think about the case, what you think about what the other jurors think, and don't tell me how the --

MS. SCHOONOVER: Right.

THE COURT: -- jurors are thinking about it. Tell me what your feeling is as to which one of those comes closest to your feeling?

MS. SCHOONOVER: Well, I guess the best way to sum that up is, which I believe is the legal way to break every thing down into pieces and look at it piece by piece. I'm having a hard time at that because I'm looking at the overall picture.

Things came up this morning where I was asked to give my opinion one way or the other and I was having a hard time giving my opinion that way when that isn't or maybe wouldn't be my opinion on the overall picture.

THE COURT: Okay, now, remember, no one can inquire into or look at your thought process as how you approach this thing.

MS. SCHOONOVER: Right.

THE COURT: Or, at least of all, me.

MS. SCHOONOVER: Right.

THE COURT: So, is there a problem that you're looking at the case perhaps differently or at least approaching it differently then the other jurors?

MS. SCHOONOVER: Yeah.

THE COURT: Do you feel -- do you feel that this is because you've come into the case with a preconceived idea or is it something to do with rather your opinion of the case is just different then the other jurors?

MS. SCHOONOVER: I think my opinion of the case is different. Especially when there is one particular topic or piece of evidence that came up today that I had to give my opinion on, and I couldn't because it had to do with a check and -- see, it's hard for me because I don't know how much I can say and how much I can't say here.

THE COURT: Well, you're doing -- you're doing fine. Cause I don't want to know --

MS. SCHOONOVER: Right.

THE COURT: -- what the particular discussion in the jury room is.

MS. SCHOONOVER: Right.

THE COURT: And I've got no right to inquire into that.

MS. SCHOONOVER: Right, exactly, I understand that.

THE COURT: What I'm -- what I'm trying to inquire into is the feeling that was expressed here for you that you don't feel that you could in clear conscience impartially decide the case.

Now, if -- if that is -- if the reason for that is that you're in a conflict position with the opinion of other jurors --

MS. SCHOONOVER: Right.

THE COURT: -- and you feel uncomfortable being in that position, I have to say that's a part of the process.

MS. SCHOONOVER: Right. I understand.

THE COURT: If it is because you have acquired knowledge about items which are affecting your ability to impartially weigh this evidence, then that's a horse of another color. That's what I'm trying to get into here. And how would you best -- how would you characterize it?

MS. SCHOONOVER: I just was --

THE COURT: Now, as -- now wait a minute. Let me suggest another consideration too. All jurors come onto the jury --

MS. SCHOONOVER: Right.

THE COURT: -- with life experiences.

MS. SCHOONOVER: Oh, yes.

THE COURT: You do not -- and sometimes they affect your judgment as to how you look at cases, however, the place where it's disqualified is where you have an experience or knowledge that you're bringing

in as evidence in the case to apply in the jury room. Now that's -- that's where you cannot bring in the life experiences.

MS. SCHOONOVER: Right.

THE COURT: But, if your experiences have colored merely the way you would look at a certain set of facts, then there is nothing disabling about that.

Everyone of your fellow jurors and you have had a perhaps a different background, a different eduction, different experiences during your life time, which -- which might enable you to -- to have a little different view of the evidence, but that would not be disabling unless in effect that previous experience is being brought in and used comparably to evidence to affect your way of looking at the evidence.

Now, having given you the menu of possibilities, tell me -- tell me what you think most fits your situation.

MS. SCHOONOVER: I just don't feel that I could put the rope around somebody's neck, they've been accused of doing things that I've done myself in my own business and I would not feel good about accusing someone of things that I have done myself and never been accused of.

THE COURT: Okay. That, I think is -- that is a significant factor, yes.

MS. SCHOONOVER: Yes.

THE COURT: Because, in effect, what you're saying is that you were bringing into consideration things which are affecting your --your way of looking

at the evidence based on your own prior experiences. Or perhaps might say in your own prior experiences are causing you to in effect disregard the evidence --

MS. SCHOONOVER: Yes.

THE COURT: Is that a fair summary?

MS. SCHOONOVER: Yes.

THE COURT: Okay.

MS. SCHOONOVER: I -- I guess, you know, in a strange way feel like a hypocrite.

THE COURT: Don't want you to feel like a hypocrite. I do appreciate your frankness here. And I will excuse you from the jury.

MS. SCHOONOVER: Okay.

THE COURT: And please do not talk about the case until it's all over.

MS. SCHOONOVER: Yes.

THE COURT: Perhaps -- perhaps you can inquire of Ms. Borgarding or one of your fellow jurors how it came out in the end --

MS. SCHOONOVER: Right.

THE COURT: And --

MS. SCHOONOVER: I don't suppose I could be present in the courtroom, come down here and watch it after sitting through it as long as I have?

THE COURT: Yes, you could be, although I would not want you to have any communication --

MS. SCHOONOVER: Okay, right, right.

THE COURT: -- with the other -- other jurors.

MS. SCHOONOVER: Yeah, exactly.

THE COURT: And if you'd like, give Ms. Borgarding your phone number and I'll ask her to call you.

MS. SCHOONOVER: Okay.

THE COURT: I gather -- I gather you run -- working in the trucking business --

MS. SCHOONOVER: Yeah, --

THE COURT: -- day in and day out.

MS. SCHOONOVER: My ex-husband takes care of it. I do all the book work. I've been doing that on the weekends which has gotten --

THE COURT: Yes.

MS. SCHOONOVER: -- piled up on me, but --

THE COURT: Okay.

MS. SCHOONOVER: -- I would like to hear how it comes out.

THE COURT: Now, I -- I will want to tell the lawyers without getting into particulars the basic reason and that is that you have had prior business experiences yourself which you think would impermissably affect your way of looking at the evidence, would that be a fair summary?

MS. SCHOONOVER: Yes.

THE COURT: Okay. Do you have any objection if I tell the lawyers that as a reason I'm excusing you?

MS. SCHOONOVER: I have no objections.

THE COURT: Okay. Now, I will tell them substantially that without getting into details.

MS. SCHOONOVER: You can even go as far as telling them you choose to or that I don't feel that the defendants are guilty.

THE COURT: I don't think I want to tell them how you think about the case or how other jurors think about the case.

MS. SCHOONOVER: Okay.

THE COURT: Because that's suppose to remain confidential within the jury room.

MS. SCHOONOVER: Right.

THE COURT: Now, after the case is all over, you are free to talk to the lawyers if you like.

MS. SCHOONOVER: Okay.

THE COURT: I want to make sure you're not getting off this jury just because of a disagreement with the other jurors.

MS. SCHOONOVER: Oh, heavens, no.

THE COURT: Okay.

MS. SCHOONOVER: Heavens no. We all get along fine.

THE COURT: Because even -- even if it's eleven to one and they're all down on Cindy Schoonover because she's being a hold out and not agreeing with them, you've got the duty to do that.

MS. SCHOONOVER: Yes.

THE COURT: Unless it's something from your own prior experiences.

MS. SCHOONOVER: Right.

THE COURT: Okay. You think that's the case.

MS. SCHOONOVER: Okay.

THE COURT: Okay, I'm going to excuse you Mrs. Schoonover.

MS. SCHOONOVER: Okay.

THE COURT: Do you have stuff up in the jury room?

MS. SCHOONOVER: Yes, I have my purse up there.

THE COURT: Okay, I'm going to suggest you go up and get it and don't discuss the case with the jurors.

MS. SCHOONOVER: Okay.

THE COURT: Tell them all good bye.

MS. SCHOONOVER: Okay.

THE COURT: And get the phone number for Milli so that we can call you.

MS. SCHOONOVER: Okay.

THE COURT: Okay.

MS. SCHOONOVER: All right.

IN CAMERA DISCUSSION ENDS

THE COURT: Let's go on the record now okay Cynthia?

COURT RECORDER: Okay.

THE COURT: I've had a talk in chambers with Mrs. Schoonover and it's on the record and I don't think there is anything that counsel after the case is over can't see or hear.

What in essence without getting into the particulars that Mrs. Schoonover told me is that she has had business experiences of her own in business that are -- have some similarity to some of the things that are in evidence in this case. And that she feels very uncomfortable and she feels it would affect unduly her judgment if she were to attempt to reach a decision in this case with her knowledge of her own business experiences.

She said she didn't from the initial description of the case at the time of the voir dire, she didn't recognize this, and in fact, she didn't fully realize it until jurors starting talking about some of the particular problems of the case and then she recognized that she had had similar experiences on her own.

I think she is not asking to be excused because she is in disagreement with the other jurors or that there has been any fight or disagreement in the jury room. I'm satisfied that that is the case. I'm satisfied that her -- her statement is genuine and sincere and that she feels that she could not be a fair and impartial juror because of her prior experience.

I therefore decided to excuse her, I have excused her and I've ask her to go up and get her things out of the jury room, but not discuss anything with the other jurors and to be on her way. She will check back in with Ms. Borgarding to figure out how the case comes out later.

Now, the question is, what do we do next. We were discussing that when the jury came down. We do have the two alternates on call pursuant to stipulation of counsel. When it's necessary, of course, we assume that if the juror would have to be excused it was because of the flu or somebody in the family died or something like that rather then for this reason, but I don't think it makes that much difference as to the reason the jurors have to be excused and that therefore probably what we ought to do is call the number one alternate, who is Mr. Walter, plug him into the jury and tell him to start their deliberations over again.

Mr. Newton, you expressed some substantial reservations about that course before -- just as the jury was starting to come in. Let me hear you out on this.

MR. NEWTON: I don't want to leave the first issue yet, Your Honor. Your Honor has excused the juror. I think I have to make an objection to that.

THE COURT: Oh you do? Okay. Why so?

MR. NEWTON: First off, as I indicated, I believed that juror probably was a good juror for the defense and other then the Court's comments just now, I really don't know anymore about the basis for the excusal, but since the Court didn't canvas opinions in advance of the defense whether or not we would agree to the excusal, to protect my client and to protect my record, Your Honor, I just have to object.

THE COURT: Okay. Your objection is on the record. Mr. James, do you care to join that objection?

MR. JAMES: Yes, Your Honor, I do.

THE COURT: Does the Government have such an objection that they'd like to express?

MS. LUM: No, Your Honor, we don't. We believe that the reason why the Court excused Mrs.Schoonover, I believe, would have been reason to challenge her for cause the initial voir dire and on that basis --

THE COURT: I --

MS. LUM: -- we would concur with the Court's agreement -- excusal.

THE COURT: I was satisfied that it would have been had she -- had she realized what the evidence was going to show and that she seemed like an honest straight forward lady to me and I think she would have expressed her view at that time.

All right. And there is a record so that counsel can review her statement to me later on and see whether -- whether they would agree that I should have excused her or not later on.

I have -- I have now done so. Now -- and we must proceed.

MR. NEWTON: Right, just again, so our record is complete. I think we probably also would be required at this time to move for a mistrial.

THE COURT: Yes, I think --

MR. JAMES: Yes, Your honor, I would join in that.

THE COURT: Okay. Both defendants move for a mistrial?

MR. NEWTON: Yes, Your Honor.

THE COURT: I'm going to deny the motion for a mistrial because I believe that the grounds for excusing the juror were proper. I thought they were items that had I known about them in the first place would have lead to an excusal for cause and I am satisfied that what has happened is not some picky and petty thing that's happened in the jury room to put her cross-wise with the other jurors.

But is in fact a reflection of her own conscientious feeling about her ability to be a fair and impartial juror in the circumstance, and that's why I have excused her, so I am going to deny the motion.

Now, next step, now we can march on to the next step Mr. Newton.

MR. NEWTON: Your Honor, given the facts that the jury really I guess just got started, I'm not enamored with the first alternate, but that's I think probably beside the point. I think it would be appropriate for the Court to call in the first alternate to instruct this jury to go home and begin deliberations tomorrow and start fresh.

THE COURT: Mr. James?

MR. JAMES: Yes, Your Honor, I agree with that.

THE COURT: Mr. Isaacs, Ms. Lum?

MR. ISAACS: Your Honor, I know this problem, I've heard of this problem coming up in a couple of cases and some result in problems about inserting an

alternate once deliberations have started. I assume that this would be with all of the parties stipulating.

THE COURT: Well, I'm not sure that that's the case. There was a previous stipulation circulated --

MR. ISAACS: Right.

THE COURT: -- first time I've had to actually pull it out of -- out of my hip pocket and actually use it which provided that, parties agreed that the alternates would be retained in an on-call status rather than being excused.

That if there was -- well, tell you what. Milli, have you got that stip?

THE CLERK: I do.

THE COURT: Let me -- let me read the language of it and make sure I've got it right. The stipulation reads, upon submission of the case to the jury, the remaining alternate jurors may be retained, parentheses (not dismissed) end parentheses. Should a deliberating juror be excused for illness, emergency, or other legal reason, an alternate juror will be selected to take the place of the excused juror. Upon substitution of an alternate juror for an excused juror following start of deliberations, the jury shall be instructed to begin their deliberations on the case from the beginning.

I see I'm going to have to slightly change the form of this ever since my -- my case where I picked the alternate at random and I got criticized by the Court of Appeal which, however, affirmed me on a ground that the error was harmless.

The Court of Appeal in that case instructed me that I have to pick the number one alternate and I have been careful to always delineate between number one alternate and number two alternate since. Number one alternate was Mr. Walter, a gentlemen from Huntington Beach.

Under the stipulation having excused Mrs. Schoonover for quote "other legal reason" unquote, I think under the stipulation, I should follow through, summon Mr. Walter, insert him into the jury and tell them to start all over again.

MR. ISAACS: Well, we, Your Honor, we have no problem with that and would gladly go along with that. If what Mr. Newton is saying that he wants them to begin then first thing tomorrow, is that --

THE COURT: Well, yes, we'd have to -- Mr. Walters from Huntington Beach.

MR. ISAACS: Yeah, so it wouldn't --

THE COURT: It would be an hour or an hour and a half before he could get here even if he was instantly on tap anyway. And by that time it would be time to send them home, so we might as well send them home, have them come back at 9:00 and --

MR. ISAACS: If we could -- if we could just take a look at this, research this a little bit and check it out upstairs before, our position is that as long as there is nothing that we can determine that would create a problem, we're gladly agreeable to it and --

THE COURT: Well, tell you what. If there is a problem, get counsel and get in here before 9:00 o'clock tomorrow morning.

MR. ISAACS: That would be fine, Your Honor.

THE COURT: Cause what I'm going to do now is summon the jurors down, excuse them for the day, tell them not to start deliberating till we get Mr. Walter here and what I will tell them is to start over again. Mr. Newton?

MR. NEWTON: In the event he is unavailable, would you then contact --

THE COURT: He would have to be excused for some good reason. Then it would be the second alternate.

MS. LUM: Your Honor, I think that also if the Court or we all decided to go with eleven jurors, I think we would be agreeable to that also, so I think we have several alternatives that --

THE COURT: Well, all right. If you stipulated to do so, I would consider -- consider that stipulation, but the previous stipulation is the one that was signed up. I -- I have circulated that stipulation in criminal cases for years and never had to use it.

MS. LUM: Right.

MR. ISAACS: Now if --

THE COURT:: And -- I mean, gee, I ought to give it a work out now, don't you think? But if -- if counsel should stipulate to a different approach, you need to tell me, cause we're going to call Mr. Walter and try to get him and tell him to be here at 9:00 o'clock tomorrow morning.

MS. LUM: Could we take a brief recess now for maybe ten minutes and then we can resolve it today

whether to have them continue on as is or then have them start tomorrow morning?

THE COURT: Okay, but, if you decide that you want to continue with the same eleven -- with eleven jurors, and the rules do provide for that --

MS. LUM: Right.

THE COURT: -- in certain situations, I will want to know whether in case one of these eleven becomes ill --

MS. LUM: What to do in that case.

THE COURT: -- then whether I can summon one or two alternates. All right, I'll go off the bench for ten minutes if counsel desire to discuss it.

MS. LUM: Thank you.

MR. ISAACS: Thank you, Your Honor.

(Court is in Recess at 2:56 p.m. until 3:10 pm.)

THE COURT: All right, United States against Boutross and Harris. All counsel and defendants are present. Is there any stipulated change to my indicated method of proceeding Mr. Isaacs?

MR. ISAACS: No, Your Honor, we're agreeable to the insertion of the -- of alternate number one, and again, assuming that they start over tomorrow and Your Honor instructs the jury that they should recommence or begin their deliberations anew.

THE COURT: All right. I'll tell them, the eleven who are here tonight and I'll also get them down here first thing in the morning before they start their deliberations to tell them again. Mr. Newton?

MR. NEWTON: Your Honor, we have no objection to the Court -- to the Court adopting the procedure that was stipulated to, however, we want to make sure that we have preserved our objection to the events that brought us to the impact of a stipulation and that is we don't stipulate that it's acceptable to us that the first alternate replaced juror number nine, because we don't think juror number nine should have been let go. But since she has been let go, we agree that this is the procedure that we had agreed to.

THE COURT: Very well. Fine. Thank you, Mr. Newton. All right. Let's get the jurors down here then.

(Court and Clerk Confer)

THE COURT: Oh, by the way, yes, I should tell counsel, we have a note from the jurors, the note I indicated where they asked for more coffee also asked for a change in their hours from 8:00 a.m. to 3:30 p.m.

MR. NEWTON: It's cruel and unusual punishment, Your Honor.

DEFENDANT HARRIS: I object, sir.

THE COURT: Mr. Harris objected. All right.

MR. NEWTON: Is that for one day, Your Honor, for Friday, or for now on?

THE COURT: It just said effective Friday. I suspect it's from now on. So everybody's going to have to start getting up in the morning. I will acquire as to whether that's schedule they want is starting tomorrow morning.

(Jury Enters at 3:12 p.m.)

(Court and Clerk Confer)

THE COURT: We'll let you have the mike Ms. Brooks as foreperson of this outfit.

MS. BROOKS: Hello?

THE COURT: Yes, we can hear you, thank you.

Ladies and gentlemen, as you can tell, I have at Mrs. Schoonovers's request excused her from further service on this jury. And here is the procedure we follow from there. The number one alternate is Mr. Eugene Walter, will be substituted, that is assuming he is available, but we're assuming he is, for Mrs. Schoonover. And we'll do this tomorrow morning. he lives in Huntington Beach, so that I suspect we couldn't get him up here before quitting time anyway.

And so I'm going to ask him to report tomorrow morning to be substituted as a juror in the case. And at that time, I will be instructing you that you will need to begin your deliberations all over again.

Now, I know this is something of a burden on you and -- but it is necessary for the reason that all jurors must participate in the deliberations on an equal basis and it's for that reason that I ask you to start your deliberations over again so that all twelve of you are operating on the same footing.

Now I notice from the first note I got today that you wanted to change your hours to 8:00 a.m. to 3:30.

MS. BROOKS: Yes, sir.

THE COURT: And that's fine with me if that's still the desire of the jury. Very well then, we'll summon the alternate juror for tomorrow morning at 8:00

o'clock and I will be here and what I'll do is I'll have you all come down into the courtroom, don't deliberate until I do. I'll give you all the same instructions about starting your deliberations anew at that time and then send you back up to go to work again.

In the meantime, I'm going to excuse you now until 8:00 o'clock tomorrow morning. Please do not talk about the case to anyone. And please do not express any opinion until all twelve of you are together again and deliberating.

Ms. Brooks, are there anything -- is there anything that you think of that we haven't taken care of here?

MS. BROOKS: No, Your Honor.

THE COURT: All right. See you in the morning at 8:00 o'clock. Thank you.

(Jury Exits at 3:15 p.m.)

(Court and Clerk Confer)

THE COURT: All right, counsel, we are now, Ms. Borgarding is going to try to get a hold of the alternate. We don't anticipate any problems since phone numbers were exchanged. However, Milli will let you know if there is a problem. And tell Mr. Walter 8:00 a.m.

MR. JAMES: That may be a problem.

THE COURT: That may be a problem. Well, tell you what --

MR. JAMES: Huntington Beach?

THE COURT: -- if -- yes.

MR. JAMES: He probably should be told that, I guess it doesn't make any difference, what if he --

THE COURT: Oh no, Milli is going to tell him he has to be here at 8:00 o'clock. Well, you know, we have jurors from Rialto, Fontana, Riverside -- well, that was Mrs. Schoonover.

MR. JAMES: I'm from San Luis Obispo.

THE COURT: Well, Mrs. Nichols who is from Los Osos. She's entitled to the per diem, and so she's undoubtedly stay -- in fact I think she said during voir dire, she is staying with a relative. We have another juror from Antelope Valley. One from La Mirada. Antelope Vallay may be on the edge of being entitled to the per diem, and so he may be in town too.

Actually, I have tried lengthy cases using the 8:00 - 1:30 schedule and the -- and going straight through the noon hour without a break for a noon hour. The jurors generally like it. I think that's because the average juror who -- if they're working out in Industry is used to having a work day that starts around 7:00 to 8:00.

MR. JAMES: I think that's how Judge Kenyan tries his cases actually tries them.

THE COURT: Although a number of judges do, well Judge Rymer started it first and then Judge Marshall picked it up, and she tries all her cases this way and Judge Kenyan is telling me this noon that he goes an 8:00 to 1:30 schedule.

I have done it. I have tried some fairly long cases on an 8:00 to 1:30 schedule, mainly so that I can have a stab at keeping up with the paper work in

chambers and the lawyers were in favor of it so they could have a stab at keeping the rest of their practice together while they tried the case, and the jurors liked it because it's the schedule they're used to working on anyway and they like a few hours during daylight hours to themselves, so generally it's fairly popular thing.

All right.

THE CLERK: I'm not reaching him.

THE COURT: You're not reaching him. All right. We will let you know if there is a problem.

MR. NEWTON: Does Your Honor want us to remain --

THE COURT: No, I don't think so, unless you want to, to confirm that they have gotten Mr. Walter.

MR. JAMES: What are we going to do is, I mean, what if we can't get him tonight. It's a problem I'm suggesting then we're going to be here tomorrow morning with no --

THE COURT: Well, well, we'll figure that one out when we cross that road when we come to it. Whether we send out platoons of marshals or whether we go to the number two alternate or what, I -- he has agreed to be on call.

THE CLERK: It's just that this is quitting time, so he is now between work and home.

THE COURT: Oh okay. He's just between work and going home according to the information Milli has, so we'll get him.

MR. NEWTON: Does Your Honor want us here at 8:00 when you reinstruct?

THE COURT: I'm -- because it's pretty formal thing, and you know what I'm going to say, I'm willing to forego it unless counsel -- but -- unless counsel want to be here. If you want me to do it without counsel here, that's okay.

MR. NEWTON: We -- we'd like to be present.

THE COURT: I will tell them in substance that first I will formally install Mr. Walter as a member of the jury and I will tell them to resume their deliberations and they must start from the beginning so that everybody is on the same footing.

MR. NEWTON: We'll be here, Your Honor.

THE COURT: Okay. See you then.

MR. ISAACS: Your Honor, is there a convenient time when we could hear what -- hear the colloquy with -- that you and Ms. Schoonover had in the -- in chambers?

THE COURT: I don't see any reason why you shouldn't listen to it right now if you want to.

MR. ISAACS: I think we're all curious as --

THE COURT: You can, you're all entitled. I'm not going to seal it or anything like that. There is nothing in there that indicates any impropriety. I did have to -- she was a little reluctant to fess up with the details, so I -- I talked to her a little bit about the various standards that I had to apply and she then told me what was concerning her. I summarized it in general terms for you earlier.

Cynthia, it's okay if they want to listen to the tape.

MR. ISAACS: Thank you.

MS. LUM: Thank you, Your Honor.

MR. JAMES: Thank you.

MR. NEWTON: Thank you.

THE COURT: All right.

AT 3:20 P.M. COURT WAS ADJOURNED

TO THE FOLLOWING DAY

APRIL 26, 1991, AT 8:00 A.M.

* * * * * * * * * * * *

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on September 29, 1992, I served the within *Petition For Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(*By Express Mail: Original and Forty Copies*)

Norman D. James
21600 Oxnard, Suite 2000
Woodland Hills, CA 91367

United States Solicitor General
Department of Justice
Washington, D.C. 20543

Jeffrey B. Isaacs
Assistant U.S. Attorney
1100 U.S. Courthouse
312 North Spring Street
Los Angeles, CA 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 29, 1992, at Los Angeles, California.

Betty J. Malloy
(Original Signed)